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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

RAYMON J. MELTON,

Petitioner,

v.

CITY OF OKLAHOMA CITY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari as part of its supervisory authority over lower courts to correct a decision, decided *sua sponte* by the court below, which was not raised, briefed or addressed by any party to the proceeding.

2. Should this Court grant certiorari to resolve a conflict with respect to the requirements for establishment of a liberty interest?

3. Should this Court grant certiorari to resolve a conflict with respect to minimal due process requirements prior to deprivation of a protected property interest in continued employment?

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A Gramling, Chief of Police for the City of Oklahoma City; Gerald L. Emmett, Assistant Chief of Police for the City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to the City Manager, Defendants

Oklahoma Municipal League, Inc. *amicus curiae*[1]

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[1] The corporations noted are public corporations with no known subsidiaries of which petitioner is aware.

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Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Raymon J. Melton, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit entered in this proceeding March 19, 1991.

OPINIONS BELOW

The en banc opinion of the Tenth Circuit is reported at 928 F.2d 920 as *Melton v. City of Oklahoma City*, and is set out at App. 1-49 of the appendix hereto ("App."). This decision was entered after an order granting a hearing en banc on four (4) specific issues. This order is reported at 888 F.2d 724, and is set out at App. 50-52. The panel

decision of the Tenth Circuit is reported at 879 F.2d 706 as *Melton v. City of Oklahoma City*, and is set out at App. pp. 53-136.

JURISDICTION

The decision of the Tenth Circuit was entered on March 1991. This granted an extension to file the instant petition for writ of certiorari until July 2, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case involves the provisions of the 14th Amendment to the Constitution of the United States which provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and the provisions of 42 U.S.C. Sec. 1983 which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. The Proceedings Below

This case involves claims by a former police officer arising from his discharge in September, 1983. On January 9, 1984, he initiated a suit in the United States District Court for the Western District of Oklahoma alleging violations of various constitutional and statutory rights. For purposes of this petition, the significant claims were that (a) plaintiff had been deprived of property in continued employment without due process of law, and (b) plaintiff had been deprived of liberty without due process of law.

On February 4, 1985, following a jury trial, a verdict was entered in favor of plaintiff, and against all defendants, except Carl Smith.

On appeal, the Tenth Circuit issued it's panel decision[2], affirming in part, reversing in part and remanding the matter for new trial. For purposes of this petition, it is significant to note that the original panel decision determined that Plaintiff had been afforded sufficient due process on his property interest claim. In addition, the original panel decision affirmed Plaintiff's liberty interest claims.

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[2] The panel decision was a 2-1 decision.

Thereafter, the Tenth Circuit issued an order on hearing en banc (App. p. 50) directing the parties to address four (4) specific issues.

On March 19, 1991, the Tenth Circuit issued it's en banc decision (App. p. 1). This decision reversed the earlier panel decision with respect to the liberty interest claim, and directed entry of judgment for defendants.

B. Statement of Facts

In 1983 petitioner, Lt. R.J. Melton, had served almost twenty-one years with the Oklahoma City police department. He had an exemplary record which included the department's highest award for bravery. As part of his duties he regularly came in contact with both judges and criminal defendants. One of his close personal friends was a local judge, William Page. One of his ongoing "snitches" was one Richard Riley.

It came to pass in 1983 that the federal government indicted William Page on a variety of criminal offenses. Part of the allegations against him were based upon evidence given by Richard Riley. Because of his familiarity with both Page and Riley, the petitioner, R.J. Melton, was called upon and interviewed by the United States Attorney's office. During this interview, Melton described reasons why he would believe Page and disbelieve Riley. This information was not disclosed to the defense. However, shortly before the beginning of the Page trial, the defense attorney, while conducting interviews of character witnesses, learned from Melton about the conversation Melton had with the Assistant U.S.

Attorney and the fact that Melton had tape recorded that meeting[3].

Page's defense counsel filed a motion to dismiss the indictment based upon prosecutorial misconduct. The basis of this motion was the information provided by Melton. In addition, at the time of the trial, Melton testified on behalf of Page.

Two days after the jury returned a verdict against Page, the Oklahoma City Police Department, acting on a complaint by the FBI, initiated an internal affairs investigation against Melton. Shortly thereafter, Melton received a letter from Lt. Carl Smith of the internal affairs unit, which informed him:

> This letter is to inform you that this office has been instructed by the Chief's office to conduct an investigation into allegations made against you by Special Agent Ron West of the Federal Bureau of Investigation.
>
> You are specifically accused of violating the Police Code of Ethics, Section 1.01 of the Oklahoma City Policy Operations Manual, by revealing details of a confidential discussion between you and Assistant U.S. Attorney Wes Fredenburg to the defense counsel of William C. Page, who was subsequently convicted of racketeering, thereby aiding his defense.
>
> You are also accused of making perjured statements both in a sworn affidavit on a motion to

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[3] The majority decision suggests that this taping was accomplished by Melton for "his own purposes". The evidence at trial was that Melton tape recorded this meeting because he was concerned that, as a friend of Page's, he might be the subject of some investigation.

> dismiss filed by defense counsel, and during testimony you gave from the witness stand during the trial.

(Pls. Ex. 48, Trial transcript p. 135). The internal affairs investigation was completed on September 6, 1991 and turned over to the Chief of Police, Lloyd Gramling. Gramling shared the internal affairs report with Lt. Dave McBride, the police department's information officer. At the time of the completion of this investigation, the internal affairs investigator had concluded that petitioner, Melton, had not committed perjury[4]. Therefore, under the provisions of the policy manual governing such investigations, internal affairs was to have "exonerated" Melton from these charges[5].

On September 8, 1983, a local daily newspaper reported that Melton was under investigation "as a result of his role in the [Page] case". The story went on to report:

> "Other knowledgeable sources said Melton is being investigated, among other things, for purportedly committing perjury during Page's trial, which ended July 29th with the Judge's conviction"

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[4] Chief of Police Gramling testified that he discussed the fact that the perjury charge was without substance with investigator Smith (trial transcript p. 899). Gramling and McBride also discussed the investigation. Therefore, before McBride even spoke to the media, he was well aware that the charges of perjury against Melton were without basis.

[5] Trial transcript p. 155.

(Pls. Ex. 49, Trial transcript p. 137)[6]. That same day, the other Oklahoma City daily newspaper published a similar story. In that story, it was reported as follows:

> Melton, a 20 year police veteran, is a longtime friend of Page. McBride said the internal affairs investigation did not establish whether Melton perjured himself. It's not the responsibility of the internal affairs to draw conclusions, McBride said. It's their responsibility to report the facts as they find them to be from the investigation.
>
> The investigative report would only reflect here's what the facts were, here's what Lt. Melton said. McBride said he does not know what specific parts of Melton's testimony are alleged to be perjured. To report the internal affairs review findings on the alleged perjury would be to try and convict Melton in the press before the review board has reached the conclusion, he said. McBride said it was unusual for the internal affairs division to investigate the perjury allegation. Normally alleged criminal violations don't go through the internal affairs division. But since there already was an internal affairs investigation about specific policy violations, the federal prosecutors choose to let up go ahead and let us do that.

(Pls. Ex. 50, trial transcript p. 140-141). There are three matters to highlight with respect to this report. First,

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[6] This same newspaper reported that they had interviewed Dave McBride, who confirmed that there was an Internal Affairs investigation of Melton which stemmed from "Lt Melton's actions prior to and during the trial of Judge Page" (Pls. Ex. 49, transcript pg. 137).

contrary to McBride's statement, he did know the outcome of the investigation into the perjury charges. That is, that there was no evidence to substantiate the charge of perjury. Second, it was the policy of the internal affairs investigation to comment on the results of the investigation by either exonerating the officer, or finding that the charges had been sustained. Finally, the remarks attributed to McBride clearly envision that the petitioner, Melton, would have the opportunity to clear his name before the Disciplinary Review Board.

After the publication of these articles, petitioner, Melton, received a notice of a departmental review board. Specifically, this notice informed him:

> You are scheduled to appear before a departmental Review Board at 9:00 a.m., Tuesday, September 13, 1983. Your appearance before this Board is as a result of a departmental internal affairs investigation.

(Pls. Ex. 51, trial transcript p. 141-142)[7].

When he arrived at the time of the Review Board, Melton was informed that the perjury allegation would not be considered. Only the issue of conduct unbecoming an officer would be considered[8]. The Disciplinary Review

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[7] On September 9, 1983, there was an editorial in the local daily newspaper which equated Melton to being a "bad apple" and asserted he was being investigated for an active role in helping prepare Page's defense (trial transcript pg. 149).

[8] It must be noted that the charge of "conduct unbecoming an officer" had become inextricably intertwined with the perjury charge. Even defendants admitted that a charge

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Board sustained the charge against Melton and recommended discharge[9]. Melton was terminated in September, 1983. Melton was not afforded any post termination hearing[10].

After his discharge, Melton was also specifically denied his statutory right to a commission as a "retired police officer" and was informed that he could not represent himself as such. Moreover, he continued to be pilloried in the press. On October 30, 1983, he was

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of this nature implicated an officer's good name and integrity. Indeed, the discharge letter states:

> [Y]ou have caused embarrassment to every employee of this department by causing other people to question the integrity of the other employees.

(Trial transcript p. 159).

[9] This Review Board was, itself, a meaningless process since the chief of police was the individual who would either accept or reject the review board findings. When questioned about this in deposition, and read at trial, (trial transcript pg. 906), the chief of police testified that had the review board recommended that Melton be retained, he would not have followed their advice.

[10] There were two appeals processes purportedly available to plaintiff. The first was an internal appeal process to the city manger. However, the testimony reflected that the city manager had already consulted with the chief of police and they had jointly decided to terminate petitioner, Melton, before the case was ever sent to the disciplinary review board. (trial transcript pg. 915-916). Moreover, there was a procedure for arbitration through the collective bargaining agreement. Such arbitration had to be filed by the Fraternal Order of Police. The president of the FOP was Dave McBride, and, not surprisingly, arbitration was denied to petitioner.

identified, along with a convicted drug offender, a murderer, as an officer who "crossed the thin blue line" (trial transcript pg. 172). As a result, as noted by witness Larry Van Schyver, it was considered throughout the law enforcement community that Melton had been discharged for both perjury as well as violation of the code of ethics (See App. p. 38).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT IN ORDER TO REDRESS A DENIAL OF DUE PROCESS BY THE TENTH CIRCUIT

Under the guise of reviewing the instruction on the liberty interest claim[11], the split en banc decision reversed the jury's verdict. The court characterized its

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[11] The trial court gave the following instruction regarding the process required when a liberty interest is implicated:

> In order to prevail upon his civil rights claim against the defendants for a violation of his right not to be deprived of a liberty interest without due process of law, plaintiff must establish by a preponderance of the evidence the following elements:
>
> FIRST: That plaintiff's termination was accompanied by public dissemination of the charges against him;
>
> SECOND: That the reasons for his dismissal would stigmatize his good name, reputation, honor and integrity or foreclose further employment opportunities; and
>
> THIRD: That plaintiff was not afforded the opportunity to clear his name at a hearing which met all of the following requirements of due process . . .

action as an attempt to correct "plain error". In fact, the majority simply re-considered the facts already resolved by the jury. In so doing, the majority determined an issue which (a) had not been raised at the trial level by the defendant[12], (b) was not addressed by either party in the principal briefs[13], (c) was not addressed by either the majority or dissent in the original panel decision[14], and (d) was not matters identified as the subject of the decision to grant rehearing en banc (App. p. 50).

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[12] The only objection to the liberty interest claim by defendants at the trial was the following:

> MR NAIFEH: Instruction Number 7, liberty interest. It instructs that on public dissemination of the charges, it should instruct on public dissemination up in the law for reasons for discharging – not charges. And we object as a matter of law that all is required, which is notice and opportunity.

(Trial Transcript pp. 1002-1004). Such an objection did not satisfy the requirements of Rule 51 with respect to the basis for reversal by the majority, see e.g. *Bell v. Mickelson*, 710 F.2d 611 (10th Cir. 1983).

[13] On appeal, the only reference even vaguely related to this matter was the argument in favor of the limited objection made at trial. That is, that the jury should have been instructed that the "reasons for discharge" rather than "charge" were disseminated.

[14] The dissent in the en banc decision expressly notes this point and states:

> [W]e intended to clear up confusion arising out of our prior decisions for the benefit of the district courts and future panels of this Court. The majority opinion, however, reverses the panel opinion and the

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While it is true that an appellate court may redress plainly erroneous instructions where objections were not raised at the trial level[15], it is a matter of fundamental fairness that the parties be afforded full notice and opportunity to address the matter. This court has held that even its broad, discretionary review power is limited to exceptional circumstances where the errors "seriously affect the fairness, integrity or public reputation of public proceedings" *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *Silber v. United States*, 370 U.S. 717, 718 (1962); *Conner v. Finch*, 431 U.S. 407, 421, n. 19 (1977). Indeed, in *Wood v. Georgia*, 450 U.S. 261 (1981) this court stated:

> The Court doubtless limits its power to notice plain error to those situations where it feels the

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judgment below on the basis of an issue never discussed in either the majority or dissenting panel opinion, see *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989), or briefed or argued in the en banc rehearing.

The majority perceives an injustice to the defendants and is determined to remedy that injustice, despite the fact doing so prevents the en banc court from reaching many of the problems it intended to resolve. Folklore has it that one of the ancients on our court once declared, "When this court starts out to do justice, all Hell can't stop it" I wish I could agree that the majority does justice in the case before us.

[15] Such errors must be patently erroneous and prejudicial, see *Zimmerman v. First Federal Savings and Loan Assn*, 848 F.2d 1047, 1055 (10th Cir. 1988), and cases cited therein.

> error is so serious as to constitute a fundamental unfairness in the proceedings.

450 U.S. at 265, n. 5.

The undersigned would request that this court grant the writ in order to exercise its discretion to correct an appellate decision which has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). Specifically this court should grant certiorari to review the propriety of the Tenth Circuit reversing the liberty interest claim without affording the parties an opportunity to address the matter.

THE TENTH CIRCUIT HAS ESTABLISHED REQUIREMENTS OF A LIBERTY INTEREST WHICH ARE IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

The parameters of a liberty interest claim arising from public employment were first set forth in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972):

> For [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Subsequent cases have repeatedly held that in order to establish a liberty interest, the plaintiff must show (a) that the nature of the charges where stigmatizing, or deprived

him of employment opportunities, and (b) that the charges were published[16].

In this case, the Tenth Circuit has, *sua sponte*, created requirements for establishment of a liberty interest in direct conflict with the decisions of this court, as well as other courts of appeals. The majority would impose upon public employees the obligation to demonstrate that (a) the stigmatizing information was released to the media by an official source, and (b) that the governmental entity made a formal charge which was, itself, stigmatizing before a liberty interest is established.

In so doing, the Court not only effectively overruled its own prior decisions, but it created a standard heretofore unknown to any other appellate court (see discussion of majority at App. 18-20).

In *McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977) and it's subsequent decision in the same case, 639 F.2d 639 (1981), (where no formal charges were brought against an employee but her contract was not renewed in an atmosphere of allegations of sexual misconduct), the 10th Circuit stated:

> Thus, if plaintiff can show to the trier of fact that the non-renewal caused or enhanced her alleged reputational damage, she will have

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[16] *Bishop v. Wood*, 426 U.S. 341 (1976), *Paul v. Davis*, 424 U.S. 693 (1976), *Codd v. Velger*, 429 U.S. 624 (1977), *Owen v. City of Independence*, 445 U.S. 622, 633 (1980).

> shown that she was entitled to a hearing or other reasonable opportunity to clear her name.

639 F.2d at 643. Similarly, the District of Columbia Court of Appeals, in *Lyons v. Barrett*, 851 F.2d 406 (D.C. Cir. 1988) (where individual was investigated on charges of sexual harassment which were not communicated to the public, but were subject to future release)[17], as did the First Circuit, in *Rodriguez de Ouinonez v. Perez*, 596 F.2d 486 (1979), *cert. denied* 444 U.S. 840 (1979) (where there was a discharge under a statute for dishonesty, but no showing of publication of specific charges), as did the Second Circuit in *Bradt v. Board of Co-op Educational Services*, 820 F.2d 41 (1987) (where allegations of sexual misconduct were simply placed in employees personnel file)[18]. In *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 83 (3rd Cir. 1989), a case remarkably similar to the instant case, the court stated:

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[17] In a similar vein, see *Walker v. United States*, 744 F.2d 67 (10th Cir. 1984) (per curium).

[18] The undersigned would note that this concept of defamation connected with discharge being sufficient to establish a liberty interest claim has been debated since the very founding of the republic. That is, during the debate over the Decision of 1789, concerning the removal power of the President, the concern over reputational damage caused simply by the discharge was repeatedly expressed. Representative William Smith argued:

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> When a police department announces to the media that it has information sufficient to occasion an investigation of on-duty drug use, that in this context the officer under the investigation refused urinalysis, and that the Department considered the overall situation such as to warrant dismissal, other law enforcement agencies are unlikely to consider the officer for other employment because, at least without more information than that reported, they will conclude that the officer is more likely than not guilty as charged.

Similarly, in *Cox v. Northern Virginia Transportation Commission*, 551 F.2d 555 (4th Cir. 1976), (newspaper articles reported that as a result of an audit, an internal investigation was held which led to the firing of the plaintiff), the Fourth Circuit stated:

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> If a public employee's tenure is subject 'to the whim of any man' . . . [the employee] . . . may be turned out, and the public may be led to suppose, for improper behavior . . . The public suppose him guilty of malpractices. Hence his reputation is blasted.

Similarly, Representative Livermore of New Hampshire argued:

> [W]hen an important and confidential trust is placed in a man, it is worse than death to him to be displaced without cause; his reputation depends on the single will of the President who may ruin him on bare suspicion.

From the debate on the Decision of 1789, reported at 1 Annals of Congress at 458, quoted at 97 *Harv. Law. Rev.* 1611, at 1620-1621.

> Procedural due process requires that a person dismissed under such a cloud be given notice and an opportunity to clear her name . . .
>
> The commission defends on the ground that there is no proof that its officers expressly told reporters that Mrs. Cox was dishonest or immoral. It says that, instead, the reporters were told that she was incompetent and failed to establish good relations with the staff.
>
> These comments, however, did not dispel the effect of the commissioners' published statements linking Mrs. Cox's discharge to the investigation of financial irregularities. Nor did the absence of formal charges of wrongdoing lessen the injury to her reputation that was caused by the interview the commissioners granted the press. The opportunity of a discharged public employee to get a new job may be hampered as badly by official leaks to the press insinuating dishonesty as by a published official reprimand. In either event, therefore, the employee is entitled to a hearing.

The import of these cases is that a liberty interest is established without regard to whether formal charges are made and irrespective of whether the employer is solely responsible for the publication of stigmatizing information. It is submitted that the majority opinion by the Tenth Circuit is in conflict with these decisions (a) by allowing the public employer to avoid responsibility by asserting that what was formally announced was "true", and (b) by requiring proof of formal charges.

(a) Truth of Announced Basis for Discharge

The majority decision turns the concept of reputational injury completely on it's head by allowing the

public employer to escape liability because the official release to media merely reported the charges and the fact of the investigation[19]. In addition to being contrary to rules previously established by the Tenth Circuit, it is at direct odds with the holding by the Third and Fourth Circuit, discussed above[20]. That is, the public employer can not escape liability by conducting an investigation which, by it's very nature, creates a stigmatizing impression, and then assert that the employee does not have the right to clear his name because they purport to take action on some other basis[21].

---

[19] Despite the majority's assertion that the reports by Lt. McBride were factually correct, the evidence in the case is simply to the contrary. That is, at the time contacted by the news media McBride stated that petitioner Melton was being investigated for perjury. At that time, according to the City's own requirements, petitioner Melton was to have been exonerated from such charges. Further, McBride lead credence to the perjury charge by suggesting normally that such charges would be handled by criminal prosecution, but that the perjury was being handled internally and would be referred to a disciplinary review board. Clearly, these charges were without merit, and, contrary to McBride's statement, were not referred to a review board.

[20] *McGhee v. Draper, supra; FOP, Lodge Five v. Tucker, supra; Cox v. Northern Virginia Transportation Comm., supra.*

[21] As noted above, the fact that the perjury charge and the violation of the code of conduct claims were so inextricably intertwined taints the stated reason. Indeed, other officers in the Oklahoma City area were of the belief that the reason for discharge encompassed the perjury charge which had been bandied about in the media. Finally, it must be highlighted that the charge of violation of the code of ethics was, by defendants own admission, one that stigmatized the plaintiff.

(b) Proof of Formal Charges

The majority also establishes the additional requirement that some "formal charge" be made. That is, that in order to amount to a "charge" as envisioned by *Paul v. Davis*, "a stigmatizing statement must be the basis of punitive action taken by a public entity against one of its employees. The majority went on to hold that "the mere reporting of the defamatory accusations or an adoption of hose accusations as "the reason for dismissal" a name clearing hearing would have been without significance. Such a ruling is in direct conflict with *Fraternal Order of Police, Lodge 5 v. Tucker, supra,* where the city accurately reported the nature of the investigation.

The Tenth Circuit has created the ultimate "Catch-22". That is, the employer can escape liability by simply refusing to provide the specific notice of charges required by due process. Discharging an employee without a hearing, after an investigation into allegations of perjury, does not comport with constitutional requirements[22]. Indeed, in the panel decision, Judge McKay correctly reasoned:

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[22] The majority asserts that there would be nothing to address in the disciplinary review board since perjury was not being considered. Clearly, it would have been appropriate to address the question of the requirement that the police department "exonerate" the petitioner Melton of the charges. This exoneration was required by their own policies. The failure to exonerate Melton clearly demonstrates that the City, by implication, if not otherwise, continued to consider the stigmatizing allegations to be valid. Thus, petitioner Melton was ruined.

> The crucial focus of any liberty interest inquiry must be the *stigmatization* which results from the publication of false and damaging information, regardless of whether it involves dissemination of "charges" or "reasons for dismissal". It is disingenuous to argue that one can stigmatize by publishing charges of this nature and then dismiss the employee on other grounds and claim no impairment to the liberty interest because "charges" are not "reasons for dismissal". In either case, the plaintiff's liberty interest in his good name and reputation has been impaired. We hold that where all other elements are met, the publication of "charges" which stigmatize can give rise to a claim that plaintiff's liberty interest has been impaired.

THE WRIT SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT HAS ESTABLISHED A RULE, IN CONFLICT WITH DECISIONS OF THIS COURT, AS WELL AS OTHER COURTS OF APPEALS, WHICH DENIED PLAINTIFF A MEANINGFUL OPPORTUNITY TO RESPOND

The original panel decision dealt with the question of petitioner's property interest in continued employment. Although the jury, after being properly instructed, had reached a verdict in favor of plaintiff, the Tenth Circuit reversed the judgment in that respect. The panel held that the internal affairs notice, and the written notice of the disciplinary review board referring to matters arising in the internal affairs investigation, was sufficient notice and description of the evidence relied upon.

This ruling is directly contrary to the requirements this court set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 523 (1985) and its progeny. Specifically, *Loudermill* requires the following:

> The essential requirements of due process . . . are notice and an opportunity to respond . . . The tenured public employee is entitled to oral or written notice of the charges against him, and explanation of the employer's evidence, and an opportunity to present his side of the story.

This language presupposes, of course, that the opportunity to respond will be meaningful, and will occur before the decision to terminate is made[23].

In this case, the process afforded to petitioner Melton was deficient in three respects. First, petitioner was not given notice of the charges. Second, he was not given an explanation of the employer's evidence. Third, the minimal process given was insufficient when it is noted that there was no meaningful post termination procedure.

(a) Notice of the Charges

The original panel decision in this case asserted that the petitioner, Melton, received notice of the charges through the notice of the internal affairs investigation.

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[23] In this regard, the Court in *Loudermill*, noted:

> [s]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes . . . Even where the facts are clear, the appropriateness or the necessity of the discharge may not be; in such cases, the only *meaningful* opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

However, that notice was subsequently held, in the *en banc* decision, not be the "charges" against Melton (see App. p. 4 and 5). Therefore, as the decision was amended by the *en banc* ruling, the Tenth Circuit has held that the internal affairs notice and subsequent Review Board notice were "charges" in the property interest claim, but not in the liberty interest claim. In any case, the notice provided to petitioner Melton in this case was clearly insufficient under rules followed by other courts of appeals, *Birdsell v. Litchfield Board of Fire & Police Commissioners*, 854 F.2d 204 (7th Cir. 1988) (informal notice of meeting with chief of police was insufficient), *Nicholson v. Gant*, 816 F.2d 591 (11th Cir. 1987) ("written notice of reasons for termination required")[24].

(b) Evidence Relied Upon

With respect to the statement of the evidence relied upon, the Tenth Circuit has repeatedly approved procedures which did not require an adequate statement of the evidence relied upon, see *Derstein v. State of Kansas*, 915 F.2d 1410 (10th Cir. 1990), *appeal pending sub. nom. Derstein v. Benson* No. 90-1238; *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989) and *Meder v. Oklahoma City*, 869 F.2d 553 (10th Cir. 1988). These cases have allowed the employee to simply be notified of an internal

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[24] The only written notice in this case referred Plaintiff to the review board as a result of the internal affairs investigation. It did not itemize either the charges or the evidence relied upon.

affairs investigation[25]. This approach is directly at odds with decisions from this court as well as other courts of appeals. In *Brock v. Roadway Express Inc.*, 481 U.S. 252 (1987), this court stated:

> [T]hese cases reflect that the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect ntails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence.

see also e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (can not rely upon ex parte proofs)[26], *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74 (3rd Cir. 1988), where the Third Circuit reasoned:

> The district court here found as a fact that the plaintiffs were advised "that there was a complaint of drug use involving police officers" but that "they were not told anything specific about the drug use allegations being investigated or the evidence regarding this drug use allegation". Without this information plaintiffs and

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[25] See also *Powell v. Mikulecky*, 891 F.2d 1454 (10th Cir. 1989).

[26] In this case, the disciplinary review board made its decision based upon the Internal Affairs report. That report was expressly denied to petitioner Melton. Indeed, that report was only obtained in the district court litigation after the defendants had resisted releasing the information in discovery because it was confidential. Had he obtained that document, he could have responded to the charges, including pointing out the need to exonerate him on the perjury charge. See also *Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990), *cert. denied* 111 S.Ct. 147 (1990).

> their attorney, even assuming they were afforded the opportunity to tell plaintiffs' side of the story, had no opportunity to explain or rebut the evidence giving rise to the "reasonable suspicion" of on-duty drug use. We hold that the failure to afford plaintiffs such an opportunity prior to the deprivation of their property interests in their jobs constituted a denial of their right to procedural due process.

Morton v. Beyer, 822 F.2d 364 (3rd Cir. 1987) (where there was an internal affairs investigation, but notice of charges was not given, and the opportunity to review the report was not provided until the day of the hearing), *Domiano v. Village of River Grove*, 904 F.2d 1142 (7th Cir. 1990) (telephone conference is not sufficient notice or hearing)[27]. Moreover, the procedure which was provided was fatally flawed inasmuch as it was not impartial[28].

(c) Post Termination Procedure

In considering the notice and hearing provided, the Tenth Circuit should have, and did not, consider the absence of any meaningful post termination procedure, see *Cleveland Board of Education v. Loudermill, supra*, 470

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[27] Petitioner would note what appears to be a contrary ruling at *Riccio v. County of Fairfax, Va.*, 907 F.2d 1459 (4th Cir. 1990).

[28] It must also be highlighted that the procedure which was used was fatally flawed since the chief of police testified that he had already decided to discharge petitioner Melton before the review board was conducted and their input would not have made a difference, see *Mangels v. Pena*, 789 F.2d 836 (10th Cir. 1986) (an impartial tribunal is required)

U.S. at 546-7, *Zinnermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 983 (1990).

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the petition for certiorari in this case should be granted.

Respectfully submitted,

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